

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL E. CAMPBELL
Claimant

VS.

KRAUSE PLOW CORPORATION
Respondent

AND

ALEA NORTH AMERICA INSURANCE COMPANY
Insurance Carrier

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Docket No. 1,025,863

ORDER

Claimant appeals the preliminary hearing Order of Administrative Law Judge Bruce E. Moore dated February 22, 2006. Claimant was denied benefits after the Administrative Law Judge (ALJ) found claimant's inconsistent testimony did not support a finding that claimant suffered personal injury by accident arising out of and in the course of his employment or that claimant's need for treatment is causally related to his claimed work-related injury.

ISSUES

1. Did claimant suffer personal injury by accident arising out of and in the course of his employment?
2. Is claimant's need for treatment causally related to his claimed work-related accident? Claimant raised the issue of notice in his Application For Review. However, the ALJ did not address this issue in the Order. The Board is limited to reviewing questions of law and fact determined by the ALJ.¹ As the ALJ did not address the issue of notice, the Board will not consider it on this appeal.

¹ K.S.A. 44-555c.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the ALJ should be affirmed.

Claimant alleges a work-related injury while standing on a tote box, welding. Claimant testified that he slipped, but did not fall to the ground, catching himself. There were no witnesses to the claimed incident. The record is full of contradictions, both in claimant's testimony and in the personnel and medical records. The ALJ found claimant's testimony to be varied and inconsistent. Likewise, the information provided to the various medical providers conflicts at times with claimant's testimony and description of the alleged injury.

Claimant alleges an accident which, initially, caused no pain and which did not inhibit his ability to perform his job. The pain in claimant's leg did not start until almost two days after the alleged incident. The pain in claimant's back did not begin until late September, after claimant's termination of employment on September 19, 2005.² As noted in claimant's testimony:

Q. Okay. So if I'm understanding your testimony correctly, the onset of your leg pain happened over the weekend, when you weren't working, in August of 2005, and then in September, late September 2005, after you've been terminated is the first onset of any low back pain; do I have your testimony correctly?

A. That would be correct.³

However, when claimant was referred to Lee R. Dorey, M.D., by his attorney, the history given to the doctor included "pain right away."⁴ Additionally, Dr. Dorey's history indicated that claimant returned to work on Tuesday evening, worked Wednesday and Thursday and was dismissed from work. There is no indication that Dr. Dorey was aware that claimant worked through the remainder of the month of August and up to September 16, working his regular job. Claimant acknowledged that he returned to work and at no time requested medical treatment for these alleged injuries until after his termination.

² See White Depo. at 16; however, see Discovery Depo. of Claimant at 30 (which states claimant's last day of work was September 16); and Resp. Brief at 5 (which says claimant was terminated on September 16).

³ P.H. Trans. (Feb. 7, 2006) at 43, lines 11-18.

⁴ Claimant saw Dr. Dorey on October 10, 2005.

Several of respondent's employees testified regarding claimant's alleged injury. Additionally, the record contains several entries describing possible injuries suffered while claimant worked on his car⁵ or while moving.⁶ It is acknowledged that claimant denied these other alleged injuries, but the conflicts in the record cast doubt on the credibility of claimant's testimony.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.⁷

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁸

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.⁹

The Board has, on occasion, given deference to an administrative law judge's determination of the credibility of witnesses. Here, claimant's entitlement to benefits depends to a great deal on claimant's testimony. The ALJ found claimant's testimony and reports to physicians to be "varied and inconsistent".¹⁰ The Board agrees, finding claimant's description of the injuries and events following to lack credibility. The Board, therefore, affirms the ALJ's denial of benefits herein.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bruce E. Moore dated February 22, 2006, should be, and is hereby, affirmed.

IT IS SO ORDERED.

⁵ Colston Depo. at 17 & 47.

⁶ P.H. Trans. (Feb. 7, 2006), Cl. Ex.1.

⁷ K.S.A. 44-501 and K.S.A. 44-508(g).

⁸ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

¹⁰ Order (Feb. 22, 2006) at 1.

Dated this ____ day of May, 2006.

BOARD MEMBER

c: E. Thomas Pyle, III, Attorney for Claimant
Elizabeth R. Dotson, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director